May 13, 2019

Via ECFS
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte*, *In the Matter of Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155

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Dear Ms. Dortch:

These *ex parte* comments are filed on behalf of Competitive Local Exchange Carriers ("CLECs") BTC, Inc. d/b/a Western Iowa Networks, Goldfield Access Network, Great Lakes Communication Corporation, Northern Valley Communications, LLC, OmniTel Communications, and Louisa Communications in response to the *ex parte* letters submitted by AT&T Services, Inc. ("AT&T"),[1] and CenturyLink[2] during the month of April.

Over the course of the last month, AT&T, CenturyLink, and other IXCs[3] have filed various letters that they claim once and for all provide the Commission with the necessary data and evidence to adopt the "prong one" proposal in the Access Stimulation NPRM, *i.e.*, the proposal that, if implemented, would require access-stimulating LECs to "bear the financial responsibility for the delivery of terminating traffic to their end office" in the event the LECs do not accept direct connections.[4] AT&T has also submitted what it claims are detailed responses to thirteen questions that the Commission's Wireline Competition Bureau staff posed in recent meetings with AT&T representatives, each of which signal the Commission's and Bureau's concerns with both of the NPRM's current proposals and the lack of concrete evidence submitted by AT&T in support of its arguments thus far.

On their face, the letters recently submitted by AT&T and CenturyLink appear to be the most substantive filings they have made in this proceeding; however, when one drills down to the text of the "facts" and "data" that these carriers rely on, it becomes clear that what is driving their arguments and

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1 Letter from M. Nodine, Assistant Vice President – Federal Regulatory, AT&T Services, Inc., to M. Dortch, Secretary, FCC, WC Docket No. 18-155 (Apr. 9, 2019) ("AT&T's April 9 Filing").

2 Letter from J. Cavender, Vice President & Assistance General Counsel – Federal Regulatory Affairs, CenturyLink, to M. Dortch, Secretary, FCC, WC Docket No. 18-155 (Apr. 30, 2019) ("CenturyLink April 30 Filing").

3 *See generally* Letter from M. DelNero, Counsel, Inteliquent, Inc., to M. Dortch, Secretary, FCC, WC Docket No. 18-155 (April 18, 2019).

4 *In re Updating the Intercarrier Comp. Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, at 4 ¶ 9 (June 5, 2018) ("Access Stimulation NPRM").

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justifications are the same vague, hyperbolic, pre-2011 allegations of harm and negative consequences that they have relied on previously, rather than current data and evidence. Moreover, the carriers' recently-filed letters further establish that they are not interested in providing new data, evidence, and facts where doing so would not further their desired end result. Rather, as the CLECs have previously stated, these carriers' are only interested in further lining their own pocketbooks, even if that means denying millions of Americans the free conferencing services they value.

The Commission should not buy into the carriers' continued smoke-and-mirrors advocacy efforts. The Commission should continue to refrain from taking further action with respect to any access stimulation reforms until it receives from the IXCs and CEA providers the post-2011 data and evidence that the CLECs have requested and that are necessary to justify any access stimulation rule changes.[5]

I. The IXCs Continue to Rely on Pre-2011 Data, Evidence, and Facts and Have Evaded the Commission's Requests for Further Information

As the CLECs have noted in past filings, the Commissioners have collectively advocated for decision making and rule making guided by a sufficient, up-to-date evidentiary record that is based on concrete evidence and in-depth analysis.[6] AT&T, however, has decided that such high standards should not be applied in this particular proceeding, as its most recent filing focuses on pre-2011 access stimulation abuses, years' old facts, and vague, lawyer-like responses that do not answer the numerous questions Commission staff have posed to AT&T.

Indeed, AT&T begins its most recent filing by focusing on the only "evidence" of access stimulation harms that it has brought forward to date: the 2011 *Connect America Fund Order* and the various statements regarding access stimulation harms contained therein.[7] In AT&T's view, this *Order* is the only evidence it needs to establish access stimulation as "an unlawful and unreasonable 'scheme' that has many 'adverse effects,'" for in making this assertion it fails to cite to and/or explain any other Commission action – let alone *any* action after 2011 – in which new access stimulation harms are discussed or found to exist.[8] In fact, in its most recent filing, AT&T supports its allegations of harm solely with statements from the *Connect America Fund Order* (or its previously submitted unsupported statements in this docket or with no support at all) on numerous occasions. Of course, AT&T's focus on the past does not stop there, as it spends *six pages* of its filing discussing actions associated with access

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[5] Agency action is unlawful if it is "arbitrary [and] capricious." 5 U.S.C. § 706(a)(2). This means that, even when an agency pursues what it believes to be a "legitimate" goal, it still "must do so in some rational way." *Judalang v. Holder*, 565 U.S. 42, 55 (2011). The lines drawn by the agency must reflect "non-arbitrary, relevant factors." *Id.* "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, **entirely failed to consider an important aspect of the problem, offered an explanation for its decisions that runs counter to the evidence before the agency**, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added).

[6] *See* Comments of Competitive Local Exchange Carriers, WC Docket No. 18-155, at 3-4 (July 20, 2018) ("CLEC Comments").

[7] *See* AT&T's April 9 Filing at 3, 7-11.

[8] *Id.* at 3

stimulation between 2007 and 2011,[9] at no point explaining how these past rule-making proceedings and the findings contained therein support the complete elimination of access charges, especially when those specific rule-making proceedings AT&T cites establish that access charges are *still necessary* to compensate LECs for the work they do for AT&T and its customers.[10]

AT&T does its best to make it appear as though it is finally going to go beyond its discussion of the past by "address[ing] certain questions raised by the Commission staff in recent meetings regarding assess stimulation,"[11] however, here, too, the carrier falls woefully short of presenting any new facts or evidence to support its position, choosing to only answer those questions that suit it while completely evading every other. Out of the 13 questions Commission staff posed to AT&T, the carrier elected to stonewall at least 6 of them,[12] whereby it either explicitly or implicitly stated that a concrete answer could not be given because of some "varying" or "dependent" fact or set of facts that were missing from the Commission's questions. For example, AT&T's responses to Questions 3, 5, 7, 8, and 12 – each of which pertain to the "prong 2" "direct connection" proposal that AT&T previously advocated for but now opposes – were as follows:

> **Q3. What would the expense be to direct connect to an access stimulator?**
>
> A3. [T]he costs associated with a direct connect vary significantly depending on the location of the access stimulator and the traffic volumes involved.[13]
>
> * * * * *
>
> **Q5. What are the sunk costs for a direct connect to the access stimulator?**
>
> A5. The sunk costs associated with a direct connect vary depending on the specific arrangement used to accomplish the direct connection.[14]

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9 *See id.* at 4-9.

10 *See, e.g.*, *In re Connect Am. Fund*, 26 FCC Rcd. 17663 ¶ 1297 (2011) ("*Connect America Fund Order*") ("Although we specify the implementation of the [bill-and-keep] transition for certain terminating access rates in the Order, we did not do the same for other rate elements, including originating switched access, dedicated transport, tandem switching and tandem transport in some circumstances, and other charges including dedicated transport signaling, and signaling for tandem switching.").

11 See AT&T's April 9 Filing at 1.

12 In addition to providing explicitly evasive answers to Questions 3, 5, 7, 8, and 12 (discussed below), AT&T also implicitly evaded answering Question 6, wherein AT&T responded to the Commission's request for information as to the "sunk costs for a direct connect to an access stimulator … connecting at AT&T's POP" by stating that "substantially all of the costs associated with a direct connect are sunk costs." *See id.* at 26. In answering this question, AT&T failed to list what specific items were deemed "sunk costs," why AT&T deemed them to be "sunk costs," and how much money AT&T dedicated to these "sunk costs." At the very least, AT&T could have provided the Commission with an example analysis; however, it elected to not even take this route, choosing instead to dodge the question entirely.

13 *Id.* at 23.

14 *Id.* at 25.

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Q7. What are the general costs (manpower, attorney fees, vendors, etc…) with negotiating a direct connect?

A7. AT&T does not separately track such costs in the ordinary course. Further, they can vary significantly depending on the particular negotiation.[15]

* * * * *

Q8. Assuming an intermediate provider between the IXC and the LEC, what is the cost of access stimulation traffic to AT&T?

Q8. Each intermediate provider has different rates and mileages, so there is no one answer to this question. The costs are unique to each specific arrangement and depend on the company that would provide the direct connect facilities to AT&T.[16]

* * * * *

Q12. What is the cost for building a circuit between "X" and "Y" (meaning, does AT&T have a general expense model it uses 'per mile' to build a trunk?)

A12. There is no general cost model that reflects the cost of building a circuit between two locations…. [T]here are significant differences in the costs of building telecommunications circuits between rural and urban areas, and this can be true even within the same company.[17]

In response to each of these questions, AT&T could have provided significantly more detail and at the very least could have answered each question by way of example, just as it did with respect to other questions posed by the Commission related to what AT&T believes is a "reasonable rate" for access stimulation traffic and the costs AT&T currently pays for transport and termination of access stimulation traffic.[18] However, the carrier elected to decline such an approach to answering these questions, likely because it is not interested in providing facts or data that could be used against it and/or that could lead the Commission to act in any way that is contrary to AT&T's desired outcome of eliminating all access charges and costs borne by IXCs.

The Commission should be concerned with AT&T's repeated refusal to provide current, post-2011 data, evidence, and facts to support its arguments and assertions and with its open defiance of the

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15 *Id.* at 27.

16 *Id.* at 28.

17 *Id.* at 33.

18 *See, e.g.*, *id.* at 20-22 (electing to answer the Commission question regarding "reasonable rates" with an extremely low rate that provides the IXC a 90 percent reduction in cost and electing to answer the Commission's question regarding current access charge costs with the unverified charges it claims to pay one *unnamed* CLEC in Iowa).

Commission's requests for further information. Such defiance is uncalled for, and with numerous commenters demanding that additional data and evidence be received and reviewed before further action is taken,[19] the Commission should not proceed with this rulemaking until AT&T and the other IXCs provide the agency will all the facts necessary to make an informed decision.

II. The IXCs Continue to Focus Solely on Reducing Their Access Charge Payments without Discussing, Explaining, or Promising Benefits to Consumers

As noted above, where the IXCs do elect to provide post-2011 data, it is solely focused on estimates of the alleged current (undefined and unsubstantiated) "costs" that the carriers pay for access stimulation traffic. However, even the IXCs' reporting of this data is skewed and incomplete, as the carriers elect to address this data using ambiguous numbers that do not break down what, exactly, is included in these costs and what is defined as an access-stimulation cost. Furthermore, the IXCs' reporting of this information is flawed because it is represented in piecemeal fashion, only providing the estimated costs associated with transporting traffic to select CLECs in select geographic areas over a select period of time, all while (still) failing to address their practice of unilaterally withholding a substantial portion of these access charges from CLECs and failing to provide information detailing the money they make off of the wholesale transport of this traffic on behalf of other IXCs.

For example, AT&T provides (for at least the third time)[20] an unsubstantiated estimate that "the current annual cost of access stimulation to IXCs (and customers) … is about $80 million,"[21] and it produces what it claims are the costs associated with transporting access stimulation traffic to one *unnamed* CLEC in Iowa.[22] CenturyLink produces similarly piecemeal and unsubstantiated evidence, providing the Commission with a six-month analysis of what it claims represents the "historical costs" for delivery of all of CenturyLink's access stimulation traffic.[23] However, at no point do these carriers provide the Commission with a clear picture of the costs they *actually pay* to the CLECs, as they fail to provide (1) the percentage or volume of minutes for which IXCs actually pay the tariffed access charges; (2) the amount of money IXCs (or AT&T in particular) are unilaterally withholding from payment to these

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19 *See, e.g.*, Letter from G. DeJordy, President, Native American Telecom Companies, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 4 (May 3, 2019) ("There are many [] illustrations of the lack of facts and the peddling of fiction in this proceeding, but the foregoing points highlight the need for a more complete and accurate record before the Commission adopts further changes to the intercarrier compensation regime."); Letter from M. Romano, Senior Vice President – Industry Affairs & Business Development, NTCA, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 2 (Feb. 22, 2019) ("NTCA urged the Commission to confine any action with respect to intercarrier compensation only to those areas in which clear and convincing evidence on the record confirms concerns.… To this end, NTCA suggested greater analysis and additional evidence are needed to establish where such concerns arise."); Letter from Andrew Nickerson, CEO, Wide Voice, LLC, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 2 ("[T]he NPRM offers no data or factual analysis regarding whether or to what extent the Commission's 2011 rate parity goals have been achieved.").

20 *See, e.g.*, AT&T's April 9 Filing at 10; *see also, e.g.*, Letter from M. Nodine, Assistant Vice President – Federal Regulatory, AT&T Services, Inc., to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 4 (Feb. 5, 2019); Comments of AT&T Services, Inc., WC Docket No. 18-155, at 10 (July 20, 2018).

21 AT&T's April 9 Filing at 10.

22 *See id.* at 21.

23 *See* CenturyLink April 30 Filing at 3; *see also id.* tb. 2.

CLECs; or (3) the percentage or volume of traffic that is not subject to tariffed access charges, but rather subject to lower-rate, commercially negotiated agreements. And, to be clear, the CLECs do not believe that AT&T pays most of the bills it receives from access-stimulating carriers.[24]

What may be worse, though, is that, despite the IXCs' continued arguments regarding access charge costs and how adopting the NPRM's "prong one" approach will substantially limit these costs, the carriers have still failed to address how, if at all, they plan on passing to consumers any savings that may be derived from this proceeding. Indeed, CenturyLink claims that adopting the "prong one" proposal will "benefit[] the consumers that ultimately bear the costs of the current inefficient regime,"[25] however, at *no point* in its filing does CenturyLink explain *how*, exactly, consumers would benefit from the carrier reducing its transport and termination access payments. Similarly, AT&T claims that adopting the "prong one" proposal will "benefit consumers … and serve the public interest,"[26] yet over 34 pages of text it does *not once* describe what these benefits are or how the public interest would be served by taking this approach.

The CLECs have on more than one occasion called out the IXCs for failing to explain how consumers are harmed by access stimulation and free conferencing services[27] and for failing to promise or expound upon the benefits IXCs' consumers will receive as a result on the "prong one" proposal's adoption.[28] Moreover, the CLECs and 2,500-plus consumers who have commented in this proceeding have provided the Commission with numerous real-life examples of how access stimulation and free conferencing services benefit the public and should be retained.[29] Clearly, based on the evidence provided thus far, consumers would be at a loss should the Commission choose to adopt the NPRM's "prong one" proposal, forcing the general public to use the IXCs' pay-for conferencing services all while the IXCs' continue to line their own pocketbooks.

III. The IXCs Have Yet to Provide the Post-2011 Data and Evidence Necessary for the Commission to Fully Address Whether Access Stimulation Reform is Needed

Of course, to date, the IXCs have evaded more than just the Commission's requests for further information, as they have still failed to provide nearly all of the post-2011 data and evidence that the CLECs listed as necessary to fully evaluate whether further access stimulation reforms are needed and/or whether the proposed reforms will truly serve the public interest. And, as noted above, where the IXCs

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[24] *See, e.g.*, CLEC Comments at 18 (explaining AT&T's pattern and practice of unilateral self-help withholding of access charge payments owed to Northern Valley Communications, LLC, over a five-year period).

[25] CenturyLink April 30 Filing at 4.

[26] AT&T April 9 Filing at 1.

[27] *See, e.g.*, CLEC Comments at 14-20; Reply Comments of Competitive Local Exchange Carriers, WC Docket No. 18-155, at 6-7 (Aug. 3, 2018) ("CLEC Reply Comments"); *see also, e.g.*, Letter from D. Carter, Counsel, Competitive Local Exchange Carriers, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 2 (Oct. 2, 2018); Letter from D. Carter, Counsel, Competitive Local Exchange Carriers, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, exh. A at 9 (Aug. 16, 2018).

[28] *See, e.g.*, CLEC Comments at 6-13; CLEC Reply Comments at 3-5.

[29] *See* Letter from D. Carter, Counsel, Competitive Local Exchange Carriers, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 1 (Feb. 14, 2019).

have provided this data, it has been submitted in piecemeal fashion, only providing insights into certain unnamed carriers and only for a short portion of the 2011-2019 timeframe that is relevant to this proceeding. Furthermore, this data has not been substantiated with actual evidence, such as invoices or carrier-to-carrier communications, but rather through the IXCs' own unverified assertions and statements, thereby calling into question whether the information they are providing is even truthful.

To date, *every* IXC involved in this proceeding has completely failed to provide the Commission with information with respect to *16 of the 17* topics the access-stimulating CLECs believe must be addressed before further action is taken, which include:

1. The rates and prices IXCs have quoted and/or charged to any wholesale long distance customer in connection with delivering traffic to any access-stimulating CLEC from January 2012 to present.

2. The revenue IXCs have earned from the monthly volumes of access stimulation traffic at issue that were carried as retail traffic and the average revenue per minute earned on a monthly basis from January 2012 to present for such traffic.

3. The revenue IXCs have earned from the monthly volumes of access stimulation traffic as issue that were carried as wholesale traffic and the revenues paid by wholesale customers (along with the identity of the wholesale customers).

4. The average monthly volume of domestic long-distance calls that IXCs' unlimited long-distance plan subscribers have made from January 2012 to present.

5. The total revenue IXCs received from unlimited long-distance plan subscribers on a monthly basis, and the total number of subscribers of such unlimited long-distance plan for each such month, from January 2012 to present.

6. The various contracts and agreements IXCs have entered into with CEA providers since January 2012 to present pertaining to the transport of access stimulation traffic.

7. The invoices received by IXCs from CEA providers for the provision of transport services for traffic to/from an access-stimulating CLEC.

8. The types of "access stimulation" termination fees IXCs have been charged by CLECs in 2009, 2010, 2011, 2016, and 2017, along with the average value of each category of termination fee IXCs have been charged in 2010, 2016, 2017, and 2018.

9. The names of every CLEC IXCs are currently withholding payment from based on allegations of access stimulation, including the unpaid balance and the date upon which IXCs first began withholding payment from each CLEC.

10. A list of all long-distance plans (including bundled offerings) offered between 2011 and 2018 by IXCs and the cost IXCs' consumers were charged for those plans.

11. Documents or evidence showing that, between 2011 and 2018, access stimulation was a factor in IXCs' setting of long distance rates and/or was identified as adversely impacting IXCs' businesses or creating business risk.

12. Documents or evidence referring or relating to any part of a proceeding wherein IXCs claimed they did not owe access charges because a LEC was engaged in "access stimulation," "mileage pumping," or "traffic pumping," including any exhibits referenced in those documents.

13. Documents or evidence describing IXCs' investment in broadband deployment, by year, from 2010 to 2018, along with documents or evidence describing all funding received from U.S. government agencies to subsidize and/or underwrite the cost of broadband deployment.

14. Documents or evidence describing and/or proving IXCs' planned 4G and 5G broadband deployment from 2018 to 2020.

15. Documents or evidence describing the number of minutes of services handled by IXCs each year from 2010 to 2018 by (a) fixed wireline origination, (b) wireless origination, (c) VoIP origination, (d) fixed wireline termination, (e) wireless termination, and (f) VoIP termination.

16. Documents or evidence relating to access-stimulating CLEC invoices submitted to IXCs, including all documents relating to IXCs' analysis, investigation, verification, payment, and/or dispute of such invoices, including documents or evidence as to which traffic was paid for in cases of partial payment of invoices.

And while CenturyLink (and CenturyLink *only*) has partly responded to the CLECs' seventeenth data request[30] by providing certain information pertaining to "the monthly volumes of [] traffic delivered to an access-stimulating CLEC," even this response has failed to significantly comply with the request made, as this aggregated six-month supply of access stimulation data shows only the "variable cost" paid to access-stimulating CLECs and does not: (a) provide the monthly volumes of traffic sent; (b) break down the monthly volumes of traffic sent (or cost) with respect to every access-stimulating CLEC to which traffic was directed; (c) indicate how much of the traffic was carried by CenturyLink on behalf of unaffiliated companies; or (d) provide data dating back to January 2011. Clearly then, CenturyLink has failed to provide useful data that would enable the Commission to perform the detailed analysis necessary to justify the relief that IXCs seek, which would include singling out and discriminating against access-stimulating CLECs.

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30 The CLECs' seventeenth document request asks the IXCs to provide:

> [D]ocuments sufficient to show the monthly volumes of the traffic delivered to an access-stimulating CLEC for each month from January 2011 to present … in a manner that distinguishes between traffic originating from one of your affiliates and traffic carried by you on behalf of unaffiliated companies (*i.e.*, wholesale traffic).

IV. Conclusion

Beyond the evidence, data, and expert reports provided by the CLECs thus far in this proceeding, the docket has been pumped with unverified allegations and unsubstantiated claims justified by nothing more than statements made in a Commission document released eight years ago before it fundamentally reformed the intercarrier compensation regime. The Commission should be concerned with this lack of transparency. In the event it keeps this docket open, the Commission should issue the proposed data requests and obtain information from the IXCs, after which the agency should review and analyze the information to determine whether the proposed rules are necessary, nondiscriminatory, and in accord with all Commission rules and precedent. Otherwise, the Commission should consider the issues resolved by its Centralized Equal Access tariff orders[31] and close the docket.

Respectfully submitted,

G. David Carter

[31] As the CLECs have noted previously, by investigating and lowering the rates of Iowa Network Services, Inc. d/b/a Aureon ("INS") and South Dakota Network, LLC ("SDN"), the Commission has resolved the lingering issues pertaining to the termination of access stimulation traffic. *See* CLEC Reply Comments at 32-34; Letter from D. Carter, Counsel, Competitive Local Exchange Carriers, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 2 (Feb. 14, 2019). To date, the IXCs have not disputed this argument, and with AT&T's most recent petition to reject or suspend the INS Tariff again, it is at least possible that IXCs will soon benefit from even further reduced rates with respect to their access stimulation traffic. *See* Petition of AT&T Services, Inc. to Reject or to Suspend and Investigate Iowa Network Services, Inc. Tariff Filing, WC Docket No. 18-60 (May 6, 2019). With these lowered CEA rates (and possibly additional savings on the way), no further Commission action is needed, especially where such action will deprive CLECs and their end users of the funds necessary to maintain and expand communications networks.